

## **9 FAM 40.35(b) Notes**

### **9 FAM 40.35(b) N1 Background and Summary of INA 212(a)(3)(E)(ii)**

(TL:VISA-77; 3-30-93)

The Immigration Act of 1990, Pub. L. 101-649, created INA 212(a)(3)(E)(ii) and added it as a subparagraph to the exclusionary ground relating to participation in Nazi persecutions. INA 212(a)(3)(E)(ii) excludes any alien who has engaged in conduct which is defined as genocide by the Convention on the Prevention and Punishment of the Crime of Genocide. Although no specific legislative background could be found, Congress apparently intended to exclude any alien whose behavior, though similar to that found excludable under the Nazi provisions, violated more universal standards.

### **9 FAM 40.35(b) N2 Convention on Prevention and Punishment of Crime of Genocide**

(TL:VISA-77; 3-30-93)

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the General Assembly of the United Nations in Paris on December 9, 1948, and was signed on behalf of the United States on December 11, 1948. By its resolution of February 19, 1986, the Senate gave its advice and consent to the ratification of the Convention, subject to certain reservations and understandings. After Presidential ratification on November 14, 1988 (subject to the same reservations and understandings), the Convention entered into force for the United States on February 23, 1989.

### **9 FAM 40.35(b) N3 Defining Genocide**

#### **9 FAM 40.35(b) N3.1 General**

(TL:VISA-77; 3-30-93)

As mandated by the INA, the definition of genocide to be used in the application of this ground of ineligibility is found in the stated Convention. It is this definition only that is to be applied. All cases which the consular officer believes may fall within the purview of the Convention must be submitted for the Department's advisory opinion [see N5 below].

## **9 FAM 40.35(b) N3.2 Elements of Genocide**

(TL:VISA-46; 8-26-91)

According to Article II of the Convention, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such:

- (1) Killing members of the group;
- (2) Causing serious bodily or mental harm to members of the group;
- (3) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (4) Imposing measures intended to prevent births within the group; and
- (5) Forcibly transferring children of the group to another group.

## **9 FAM 40.35(b) N3.3 Intent to Commit Genocide Required**

(TL:VISA-77; 3-30-93)

The United States' understanding of the Convention is that acts committed in the course of armed conflicts, no matter how atrocious, do not constitute genocide unless there is a showing of specific intent to destroy a group by means of the actions specified in 9 FAM 40.35(b) N3.2 above. War crimes, per se, do not equate to genocide absent the intent required by Article II of the Convention. Consequently, a finding of ineligibility under INA 212(a)(3)(E)(ii) cannot be made unless it can be shown that the alien was motivated by a clear intent to destroy the groups or groups being targeted.

## **9 FAM 40.35(b) N4 Engaging in Conduct Defined as Genocide**

(TL:VISA-77; 3-30-93)

a. The Convention defines acts of genocide in very specific terms [see 9 FAM 40.35(b) N3 above] and, in Article III, lists conduct relating to that definition as punishable under the provisions of the Convention. These acts are:

- (1) Genocide;
- (2) Conspiracy to commit genocide;

- (3) Direct and public incitement to commit genocide;
- (4) Attempt to commit genocide; and
- (5) Complicity in genocide.

b. The commission of any of the above acts falls within the purview of INA 212(a)(3)(E)(ii) as engaging in conduct relating to genocide.

## **9 FAM 40.35(b) N5 Security Advisory Opinion Required**

(TL:VISA-77; 3-30-93)

All cases of possible ineligibility under INA 212(a)(3)(E)(ii) must be submitted for the Department's security advisory opinion by means of a "VISAS DONKEY" telegram slugged for CA/VO/L/C and the appropriate country desk. Once an advisory opinion has been requested, no visa may be issued until the Department's response has been received.

### **9 FAM 40.35(b) N5.1 Information Provided in Advisory Opinion Request**

(TL:VISA-77; 3-30-93)

Consular officers are requested to provide as much information as possible, regardless of how insignificant it may appear, to assist the Department in rendering an opinion relative to visa eligibility. The advisory opinion request must include specific details regarding the following:

- (1) The applicant's name, date and place of birth, and position or rank (if applicable);
- (2) The type of visa applied for, the date of application, and the intended travel plans and destination(s) in the United States;
- (3) The nature of the acts of genocide performed and the applicant's role in their commission;
- (4) The national, ethnic, racial, or religious group(s) against whom the acts were targeted;
- (5) The place where, the circumstances under, and the time period within which the acts were omitted;
- (6) The applicant's purpose for committing such acts and the sanctioning authority, if any; and

(7) The consular officer's evaluation of the case and recommendation regarding visa eligibility.

**9 FAM 40.35(b) N5.2 Genocide Committed Under Government Authority**

(TL:VISA-77; 3-30-93)

If an act of genocide was committed under government order, the consular officer should attempt to supply evidence of such order and provide all other available related details, including the person or group under whose authority the order was issued.

**9 FAM 40.35(b) N6 No Relief Available**

(TL:VISA-77; 3-30-93)

Consular officers are reminded that there is no waiver relief available to either nonimmigrants or immigrants who are ineligible under INA 212(a)(3)(E)(ii)

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